**BR-107631-A**

Faculty member of museum school was not disqualified from receiving benefits between semesters under G.L. c. 151A, sec. 28A. The museum school was a division of a single employer corporation, the museum, whose mission was not educational, but to make art accessible to the public.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCEDEVELOPMENT
BOARD OF REVIEW



# Board Of Review Decision



## Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to grant benefits to the claimant following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

Benefits were granted after the review examiner determined that the claimant was not disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner for additional evidence. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the subsequent consolidated findings of fact.

The claimant separated from the employer on April 17, 2007. She filed a claim for unemployment benefits with the DUA and was initially denied benefits in a determination issued by the agency on June 11, 2007. However, on February 6, 2008, the agency issued a re-determination granting benefits to the claimant. The employer appealed that redetermination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's redetermination to award benefits to the claimant in a decision rendered on July 24, 2008. Both parties participated in the hearings.

We will address the issues on appeal in order. First, we must decide whether the claimant worked for an educational institution. If she did, we must next decide whether she had a reasonable assurance of returning to similar work with the employer during the subsequent semester. If not, then we consider whether she was discharged due to no fault of her own.

# Findings of Fact

The DUA review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked for the employer, a museum, as an associate faculty member from 1988 until April 17, 2007, when the employer discharged the claimant.

2. The employer discharged the claimant due to lack of work.

3. The claimant worked for 26 hours per week, on average.

4. The employer, a museum, has a department that functions as a higher education institution. The claimant worked for this department.

5. On April 17, 2007, the claimant completed her contract to work the 2006-07 school year, which consisted of two 12-week semesters.

6. The claimant was paid through May 12, 2007.

7. The claimant did not quit the job. The claimant did not violate any rules or policies of the company to cause her separation from employment.

8. The claimant began to work again on a new contract for the 2007-08 school year on September 4, 2007.

9. The claimant received no offers from the employer to perform wage-earning services for the employer during the period of time from April 17, 2007[,] through September 4, 2007.

10. The [museum school] is accredited by the Department of Education and the National Association of Schools of Art and Design. (See Remand Exhibits #11-12.)

11. The [museum school] offers certificate and diploma programs in illustration and graphic design. These are post-baccalaureate programs, continuing education programs, and fifth-year programs. These are not degree-conferring programs where the certificates and diplomas signify only that a certain number of years of full-time academics [sic].

12. In partnership with [partner university], the [museum school] also offers Bachelor of Fine Arts and Master of Fine Arts degrees. Students who wish to enter programs for the Bachelor or Master of Fine Arts must apply to both the [museum school] and [partner university]. If either body rejects the student's application for admission, the student will not be able to receive the degree. [Partner university] issues the degree. The classes in the Bachelor and Master of Fine Arts programs are taught by [partner university] professors at both the [partner university] and [museum school] locations.

13. There are 700 undergraduate students, 100 graduate students, and 780 non-matriculated students at the [museum school].

14. Students can submit a FAFSA form to receive federal financial aid. It is unknown whether non-matriculated students are eligible for federal financial aid.

15. The [museum school] does not teach math, science, history, or geography.

16. The [museum school] is a division of the [employer].

17. The [museum school] has its own board of governors or board of trustees.

18. The [museum school] is in a separate building from the [employer].

19. There is one human resources department and one finance department for both the museum and the school, but employees within those departments are assigned to work for the museum or the school, but not both.

20. The [museum school] has separate finances from the [employer].

21. The claimant's paycheck states that it comes from the [employer]. The pool of money from which the claimant's pay is drawn is the school's pool of money.

22. The employer or claimant did not present articles of organization for the [employer] or the [museum school].

23. In 1890, the charter for the museum stated that the museum should have a school.

24. The mission of the [employer] is to make art accessible to the public. The mission of the [museum school] is to educate artists.

25. The employer offered the claimant a contract for the fall 2008 semester and the following spring semester on July 10, 2008. (See Remand Exhibit #10.)

26. The claimant has taught every fall and spring semester since the 1988-89 school year. Before that, the claimant taught in the night program. The contracts for each school year typically were issued by the employer before registration of the fall semester. The hours would change from year to year.

# Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for ... the period of unemployment next ensuing ... after the individual has left work ... (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence....

G.L. c. 151A, § 28A, states in relevant part, as follows:

> Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:
>
> (a) with respect to service performed in an instructional, ... capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms, ... to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms....

There is no dispute that the claimant performed services in an instructional capacity and that she sought benefits for the period between two academic terms. However, in order to apply G.L. c. 151A, § 28A(a), to the claim before us, the claimant's services must have been performed for an educational institution.

Before deciding whether the claimant worked for an educational institution, we must first identify the claimant's employer. Based upon the facts before us, we conclude that the claimant was employed by the [employer], and that, for the purposes of G.L. c. 151A, §28A(a), the [museum school] has no separate identity as an employer. We reach this conclusion for the following reasons.

In 1976, the Supreme Judicial Court identified the employer of the staff of a school of art that was housed within a different museum, in order to decide whether the museum was required to pay unemployment taxes for those employees. *See* De Cordova and Dana Museum and Park v. Dir. of Division of Employment Security, 370 Mass. 175 (1976). In that case, the Court considered whether the instructors in the De Cordova's school of art were employees of a school or employees of the parent museum which sponsored the school. The Court found that, since the school although functionally distinct from parent museum was not separately incorporated, and since the purpose of the parent was to serve as a museum rather than as a school, then the employees of the museum's school of art could not be characterized as employees of a school. Id. at 177, 180[1].

The facts before us are similar. As with the school of art employees in De Cordova, the claimant worked exclusively on a contract basis as an art instructor in the [employer]. Also in the present appeal, the review examiner found that the [museum school] was a functionally separate "department" or a "unit" of the [employer]. There was no evidence, however, to suggest that these entities were separately incorporated. Moreover, the [employer] issued the claimant's paychecks, and a single human resources unit and accounting department served both the [employer] and the [museum school].

The next inquiry is whether the [employer] is an educational institution. Although the [museum school's] mission to educate artists was demonstrably educational, it is only one division within the [employer's] overall organization. The [employer's] mission is not educational, but rather it is to make art accessible to the public. These are not the same. Given this distinction, we conclude that the claimant's employer is not an educational institution, and, therefore, G.L. c. 151A, § 28A, does not preclude her from collecting benefits. *See* Town of Milton v. Dir. of the Division of Employment Security, 386 Mass. 831 (1982) (claimant school bus driver, although concededly performing services in support of an educational purpose, was employed by a commercial bus company rather than by a school district and therefore was not disqualified by G.L. c. 151A, § 28A).

Lastly, we must examine the circumstances of the claimant's separation in order to determine whether she is ineligible for benefits, under G.L. c. 151A, § 25(e)(2). Here, the claimant was not fired for cause, nor did she quit. The review examiner found that she was separated on April 17, 2007, due to lack of work. In the absence of any evidence that she engaged in misconduct or violated an employment policy, we conclude that G.L. c. 151A, § 25(e)(2), does not disqualify the claimant from receiving benefits.

We, therefore, conclude as a matter of law that the claimant was not subject to the provisions of G.L. c. 151A, § 28A(a), nor disqualified under G.L. c. 151A, § 25(e)(2).

The DUA review examiner's decision is affirmed. The claimant was entitled to receive benefits for the week ending June 16, 2007, and for subsequent weeks, if she was otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF MAILING - August 17, 2009**

/s/
John A. King, Esq.
Chairman

/s/
Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**
**(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – September 16, 2009**

AB/JAK/rh

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[1] We acknowledge that the specific section of G.L.c. 151A that was at issue in De Cordova was not G.L. c. 151A, § 28A, but rather was a subsequently amended provision in G.L. c. § 4A; however, we believe that the underlying logic of the analysis in that case is directly on point to the present appeal.